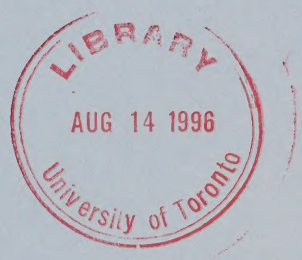
CANADA

National Energy Board

Report

Intervenor Funding Options



March 1996

National Energy Board

Report

In the Matter of

Intervenor Funding Options

March 1996

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Definitions

AEUB	Alberta Energy and Utilities Board
AFA	Alternative Funding Arrangements
CEAA or Agency	Canadian Environmental Assessment Agency
CEA Act	*Canadian Environmental Assessment Act*
CRTC	Canadian Radio-Television and Telecommunications Commission
DFO	Department of Fisheries and Oceans
DIAND	Department of Indian Affairs and Northern Development
DOE	Department of Environment
EPN	Early Public Notification
ESRF	Environmental Studies Research Fund
FAA	*Financial Administration Act*
FEARO	Federal Environmental Assessment and Review Office
FTP	Flexible Transfer Payments
Ministry	means the members of the Queen's Privy Council for Canada, who have been sworn to office as Ministers of the Crown, whether or not they have also been invited to sit in the Cabinet by the Prime Minister of Canada.
NEB or the Board	National Energy Board
NEBA	*National Energy Board Act*
NGOs	Non-Governmental Organizations
NRCan	Natural Resources Canada
OSC	Office of the Secretary of the National Energy Board
OTP	Other Transfer Payment

PFP	Participant Funding Program
SPAs	Specified Purpose Accounts
TC	Transport Canada

Prefix

OFFICE OF THE CHAIRMAN

BUREAU DU PRESIDENT

CANADA

NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ENERGIE

March 21, 1996

The Honourable A. Anne McLellan, P.C., M.P.
Minister of Natural Resources
21st Floor, 580 Booth Street
Ottawa, Ontario
K1A OE4

Dear Ms. McLellan:

Financial Assistance to Intervenors in NEB Proceedings

I have pleasure in attaching an Intervenor Funding Options Report which responds to your December 12, 1995 request, made pursuant to Section 26(2) of the National Energy Board Act, for advice as to the above. I am available to discuss this matter at your convenience.

Yours sincerely,

R. Priddle

Attachment

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Request by the Minister of Natural Resources

Minister
of Natural Resources Canada

Ministre
des Ressources naturelles Canada

Ottawa, Canada K1A 0E4

DEC 12 1995

Mr. Roland Priddle
Chairman
National Energy Board
311 - 6th Avenue South West
Calgary, Alberta
T2P 3H2

Dear Mr. Priddle:

I am exploring, as a priority matter, the possibilities for providing financial assistance to intervenors participating in National Energy Board proceedings, with particular regard to proceedings under Part III of the *National Energy Board Act*, especially where landowners' interests are directly affected.

Therefore, would you please advise me as soon as reasonably possible, pursuant to subsection 26.(2) of the *National Energy Board Act*, as to the best method or methods of addressing this matter within the present federal legislative framework.

Yours sincerely,

A. Anne McLellan

Overview

The Board has conducted an examination of the methods of providing intervenor funding pursuant to existing Federal legislation, as requested by the Honourable A. Anne McLellan P.C., M.P., Minister of Natural Resources by letter dated 12 December 1995. Options were narrowed into three groupings: voluntary options which can be implemented by the energy industry; statutory options which exist under other Federal legislation; and a budget based option which can be implemented under the *National Energy Board Act* ("NEBA"), the *Financial Administrations Act* ("FAA") and an appropriations act.

The examination of the issue of intervenor funding included a review of pertinent legal cases. The Board was particularly concerned that the design of any intervenor funding program for proceedings before the National Energy Board ("NEB") should not raise conflicts with past decisions of the Courts in relation to this topic. The review conducted of applicable legal cases demonstrated that there would be no impediment presented by case law to the creation of an intervenor funding program for proceedings before the NEB.

The Board has identified a budget based option that could be implemented by Parliament and the NEB. That option would consist of an intervenor funding program established pursuant to spending authority enacted through the departmental estimates by Parliament in an appropriations act, with subsequent disbursements made under NEBA and FAA expenditure management controls and recovery of those disbursements through the NEB's cost recovery mechanism. This option would provide an efficient funding mechanism and allow for specific intervenor funding decisions to be made by the NEB. Despite some administrative complexities, this is the preferred option for implementing intervenor funding, in the absence of specific legislation, due to its flexibility.

The Board also examined one potential industry-sponsored option for intervenor funding. Under that option, intervenor funding would be provided by industry on a voluntary basis, with subsequent recovery of disbursements through tolls charged by the companies for the transportation of commodities. This option can be accommodated through the NEB's traditional cost of service regulation. Advantages in this approach exist because of its voluntary aspect and its integration with the existing regulatory structure and mandate of the NEB. However, the recent evolution of multi-year toll settlements amongst major pipelines appear to place practical impediments in the way of its adoption by industry.

Finally, two non-energy legislative options were identified in the study. The first consisted of funding pursuant to the *Canadian Environmental Assessment Act* ("CEA Act"), an existing means of funding intervenors in major facility construction cases. However, the availability of funding for intervenors under the CEA Act is uncertain. Another option involved fees and charges pursuant to the *Financial Administration Act*. However, it suffered from the disadvantage of significant administrative burdens. Neither option was pursued but they are addressed in Appendix I of this report.

Recommendations

In this report, the Board has concluded that a budgetary approach to intervenor funding should be the basis of any intervenor funding program administered by the NEB. Thus, the NEB would provide intervenor funding where: the intervenor could not afford to pay for the necessary legal and related services, and recourse was not available to other sources of funding. Intervenor funding from the NEB would be budget based and consist of the following:

- spending authority enacted through the departmental estimates by Parliament in an appropriations act;
- administrative rules to be made by the Board pursuant to section 8 of the NEBA;
- delegation of the approval function by the Board to an officer who would not be associated with the specific regulatory process for which intervenor funding is sought;
- appointment of outside advisors by the Governor in Council pursuant to s. 10 of the NEBA to screen intervenor funding applications;
- enactment of appropriate amendments to the *National Energy Board Rules of Practice and Procedure, 1995* to set out the information requirements and forms for making applications to the Board for intervenor funding;
- actual disbursement of funds in accordance with a contribution agreement under the FAA or an agreement for which legal authority exists pursuant to the NEBA;
- subsequent recovery of all intervenor funding expenditures made by the NEB from companies subject to the continuing jurisdiction of the NEB pursuant to the *National Energy Board Cost Recovery Regulations*;
- post-hearing auditing of expenditures made by intervenors pursuant to contribution agreements or agreements made under statutory authority to ensure that monies provided to intervenors have been expended prudently and for the purpose for which they were provided.

Should government policy determine that it would be desirable to implement intervenor funding, Parliament must consider and enact expenditure authority in an appropriations act. Following such an enactment the NEB could proceed to launch an intervenor funding program by creation of the necessary administrative and policy instruments. A substantial degree of public and industry consultation will be necessary for the implementation phase of NEB intervenor funding.

Preface

Intervenor funding is an issue that has increasingly arisen in connection with administrative proceedings and reflects both the increasing complexity of issues faced by tribunals and the interface between those issues and the lives of the general public. Although tribunals often have well established public consultation and public hearing processes, many members of the general public and interest groups have voiced concerns that, without adequate resources, they are unable to effectively represent their interests on a par with large project proponents, who possess ample financial and human resources. Indeed, as early as 1978, commentators voiced concern about the lack of a level playing field, particularly with regard to environmental and land use issues. In "Environment on Trial" published in that year, the authors David Estrin and John Swaigen said in connection with Ontario's *Environmental Assessment Act*:

> ... public hearings will surely be tokenism and provide for nothing more than ventilation of emotional viewpoints, unless criticisms of the impact statements and project opposition are based upon solid information. To ensure meaningful proceedings, the citizens opposing or criticizing such schemes must also have access to environmental experts and lawyers.

Much the same complaint is occasionally voiced in connection with proceedings before the NEB. The Federal government has responded to such complaints in a number of creative ways. The NEBA was revised by providing for the award of costs pursuant to s. 39 of the NEBA for detailed route hearings. However, since March of 1983 when that section of the Act came into force there has yet to be a detailed route hearing for a new pipeline, and as such cost awards for new pipelines have not been realized by potential intervenors. The NEB also attempted to fashion a general power to award legal costs in the mid-eighties, but that attempt was dashed by a judgment of the Federal Court of Canada. More recently, the Federal government has entered the field of intervenor funding with a funding program administered by FEARO which has been extended under the CEA Act and is now administered by the CEAA.

The year 1996 marks the NEB's first experience with intervenor funding pursuant to the CEA Act, in a significant hearing involving the proposed construction and operation of a major oil pipeline to export oil and oil products from Canada. Funding has been provided to environmental interest groups by the CEAA so that intervenors may advance their special concerns to the NEB, and thereby contribute to the creation of a complete record in respect of the project.

The concept of balance remains an important aspect of intervenor funding. The creation of a balance between the strategic interests participating in administrative proceedings is an overall policy objective. In addition, the funding program itself must balance considerations of impartiality, fairness, transparency and administrative efficiency. Often such considerations are applied in the drafting of specific legislation designed to create an effective intervenor funding program. An example exists at the provincial level in the form of Ontario's *Intervenor Funding Project Act*. Similar legislative efforts have been proposed at the federal level. However, other mechanisms to promote intervenor funding also exist in relation to the NEB.

In order to examine how intervenor funding could be implemented pursuant to the NEBA, without the necessity of specific amendments to existing legislation, the Minister of Natural Resources, the Honourable A. Anne McLellan P.C., M.P., wrote to the NEB by letter dated 12 December 1995 to request the Board, pursuant to section 26 (2) of the NEBA, to determine "the best method or methods of addressing this matter within the present federal legislative framework". This report has been prepared in response to the Minister's request.

Although the NEB recognizes the value of approaches requiring the passage of specific enabling legislation by Parliament, the focus of this examination of the issue of intervenor funding rests on those methods of implementing intervenor funding which may currently exist under current Federal legislation, or annual budgetary legislation and which do not require the passage of specific enabling legislation by Parliament.

Chapter 1

The Legal Framework

1.1 Introduction

There has been some confusion in the past concerning the difference between an award of costs and an award of intervenor funding. Costs are a long-established legal remedy available in the courts of law whereby a litigant who has been substantially successful in a trial or appeal can recover some or all of the costs of the litigation from the unsuccessful litigant. The principle upon which an award of costs is based is indemnification or compensation to the successful litigant. The recovery of costs is made pursuant to an order of a court after the conclusion of a trial or appeal.

Intervenor funding, on the other hand, consists of the provision of funds to an intervenor in order to assist that intervenor in preparing and participating in a public hearing. The funded intervenor has complete discretion in the expenditure of those funds, although there may be a requirement for an accounting of those funds and for remission of unused funds subsequent to the proceeding for which the funds were awarded. In many ways it may be perceived as an element of contemporary participatory democracy.

1.2 The Distinction Between Legal Costs and Intervenor Funding

Costs are commonly assessed in one of two ways. Party and party costs represent the typical award of costs made in favour of a successful litigant and are the most common cost award made by courts of law. Party and party costs consist of a partial indemnification of the costs incurred by a successful litigant and are assessed in accordance with a tariff of fees and costs prescribed by the court.

Solicitor and client costs are a form of costs which are also based on indemnification and compensation principles in favour of a successful litigant following the conclusion of a trial or appeal. Here however, the scale of indemnification and compensation is higher than party and party costs and represents indemnification and compensation for almost all litigation costs. Solicitor and client costs are awarded where there has been misconduct by the unsuccessful litigant, such as a breach of a solicitor's undertaking, thereby causing the successful litigant to endure the costs and trouble of litigation unnecessarily, or for a longer period than was warranted by the circumstances. The courts of law prescribe a tariff of costs on the solicitor and client scale in like manner as they do in respect of party and party costs.

In light of the past confusion surrounding the differences between an award of costs and intervenor funding, a number of recent court cases have contrasted the power of a tribunal to award intervenor funding with the power to award legal costs. *Manitoba Society of Seniors Inc.* v *Greater Winnipeg Gas Co.* concerned the power of a tribunal to award legal costs. There, a board attempted to rely on a power to award costs in order to make available intervenor funding at the expense of the proponent. The Manitoba Court, per Justice Huband decided that the board had no power to award intervenor funding. He stated:

> I am of the view that [the legislation] relates to an award of costs after a hearing. It is my view that the preliminary demand for costs could not be met by the Board under existing legislation. One can understand why the legislation does not provide for the Board to make a preliminary award in costs. The Board's function is not simply to provide a forum for a hearing, but rather to play an active part in any such hearing to protect the public interest, including the interests of senior citizens.

That decision was subsequently applied by an Ontario Court in *Re Regional Municipality of Hamilton-Wentworth and Hamilton Wentworth Save the Valley Committee, Inc.*. In that case, an Ontario tribunal possessed a power to award costs under the *Consolidated Hearings Act* 1981 and purported to use that power to award intervenor funding. The statutory provisions that permitted the tribunal to award costs stated in part:

> 73(4) A joint board may award costs of a proceeding before the joint board.
>
> (5) A joint board that awards costs may order by who and to whom the costs are to be paid.
>
> (6) A joint board that awards costs may fix the amount of the costs or direct that the amount be taxed, the scale according to which they are to be taxed and by whom they are to be taxed.

In that case, an Ontario tribunal ordered pre-hearing intervenor funding to be paid for by an applicant, subject to the board's discretion to approve the intervenor's costs. The Court ruled that the statute did not permit the board to do that and accordingly the tribunal had acted outside of its jurisdiction by attempting to fund interventions in advance of a hearing, and before the tribunal could have had an opportunity to determine the value of the contributions made by the intervenor with respect to the issues before the tribunal. The Court also said that the tribunal had no power to award intervenor funding and that it was the prerogative of the Provincial Legislature, in clear language, to so empower a tribunal.

Both the Manitoba and Ontario courts ruled that a tribunal which possessed a power to award costs in a proceeding could not rely on that power to award intervenor funding. Those courts drew a firm distinction between intervenor funding and legal costs. Intervenor funding, according to the courts, consists of a block of money provided to a party before a hearing to fund the participation of that party in the proceeding. Legal costs, on the other hand, consist of compensation or indemnification for the litigation expenses of a successful litigant.

In 1986 the Supreme Court of Canada upheld that distinction in the case of *Bell Canada* v *Consumers Association of Canada et al.* In that case, involving the Canadian Radio-Television and Telecommunications Commission ("CRTC"), the tribunal possessed the power to award legal costs and Justice LeDain stated:

> I would agree that the award of costs ... must carry the same general connotation as legal costs. It cannot be construed to mean something quite different from or foreign to that general sense of the word, such as an obligation to contribute to the

> administrative costs of a tribunal or the grant of a subsidy to a participant in proceedings without regard to what may reasonably be considered to be the expense incurred for such participation. Thus I am of the opinion that the word 'costs' must carry the general connotation of being for the purpose of indemnification or compensation.

Finally, in 1986 the Federal Court of Appeal issued an important ruling with respect to the jurisdiction of the NEB to award costs. In *Reference Re National Energy Board Act*, the NEB referred the following questions to the Federal Court of Appeal:

> 1 Does the National Energy Board, in connection with a public hearing held pursuant to subsections 17(1) and 20(3) of the National Energy Board Act for the purpose of reviewing a portion of an order made pursuant to section 49 of the Act, have the jurisdiction to award costs to one party payable by another party to the public hearing
>
> 2 If the answer to Question 1 is in the affirmative, does the National Energy Board, where costs are awarded, have the jurisdiction to establish a scale of costs or otherwise to fix or to limit the amount of costs to be paid

It is notable that those questions concerned the award of legal costs, not intervenor funding, by the NEB

When the matter went to court arguments put to the Court included:

1. The Board had an express power pursuant to its general jurisdiction as a court of record, possessed with all of the powers of a superior court necessary for the exercise of its jurisdiction, to award costs.

2. The Board had the power to award costs by necessary implication.

3. The Board had a power to award costs by virtue of subsections 29.6 and 75.21 which were indicators of specific restrictions on a general power relating to costs.

In addition, despite the specific questions posed to the Court on the reference, some arguments were addressed with respect to the issue of intervenor funding by proponents under compulsion from the Board.

The Court decided that the Board did not have the power to award costs. In particular, the Court ruled that the Board did not have the power to award costs pursuant to its general power as a court of record possessing certain of the powers of a superior court. Furthermore, the Court ruled that 'costs' meant legal costs and not intervenor funding. The Court adopted the criteria set out by the Ontario Court in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* for defining costs. Those criteria were:

1. They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

2. Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

3. They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

4. They are not payable for the purpose of assuring participation in the proceeding.

Justice Heald stated; "In my view, those criteria represent a correct analysis of the necessary characteristics of 'court costs' and since, in this case, those criteria are not met, I do not think a case has been made out for inherent jurisdiction to provide intervenor funding".

Essentially, the Federal Court in the *Costs Reference* decided that there was no power under the Board's general jurisdiction to make awards of legal costs, which was the subject matter of the reference, and that in any event intervenor funding did not constitute legal costs.

The second argument advanced to the Court concerned the question of whether the Board had a power to award costs by necessary implication, arising from the NEBA. The Federal Court advised the Board that there was no evidence of a practical necessity for implying a general costs power in order to enable the Board to attain the objects specified in its legislation by Parliament. The Court said that it would be fairly easy for Parliament to provide the Board with a specific power to award costs and therefore such powers should not be implied in circumstances where there was no express power in the Board's legislation to award costs.

The third argument concerned the Board's special powers to award costs in respect of a detailed route hearing and awards of costs made by arbitrators in Part V arbitrations. It was argued that the existence of those provisions did not represent the conferral of special powers by Parliament but rather consisted of limitations on a general power to award costs. With respect to that argument, the Court applied the legal maxim *expressio unius est exclusio alterius* which means that whatever is not expressly included in legislation must be taken to be excluded from the legislation.

The *Costs Reference* has caused some confusion because it originated as a case concerned with the award of legal costs but was argued, at least to some extent, as a case concerned with the award of intervenor funding. However, applying the theory that a case is only authority for what it actually decided, leads us to the conclusion that the *Costs Reference* is legal authority only for the proposition that the NEB does not have a general power to award legal costs. That much of the decision flows from the specific questions posed to the Court and that result is binding upon the Board to this day.

Therefore, other than holding that intervenor funding cannot be included within the concept of legal costs, which the Board lacks jurisdiction to grant anyway, the *Costs Reference* is not an authority with respect to intervenor funding in other contexts within the activities of the NEB. A narrow approach appears to be the perspective of the Federal Court itself, according to subsequent judgment of that Court in *Banca Nazionale Del Lavoro of Canada Ltd.* v *Lee-Shanok* where Justice Stone explains the importance of the *Costs Reference* in the following terms:

> Before leaving the subject, I wish to say a few words on the relevance to the present discussion of this Court's decision in *Reference Re National Energy Board Act*, relied on by the applicant. It was there held that the National Energy Board, in its mandating statute, had no general discretion over costs. The Court was called upon to decide whether s. 10(3) of the National Energy Board Act R.S.C. 1970 (2nd Supp.), c. 10, empowered the Board to award costs in a proceeding before it. The Court answered the question in the negative, Mr. Justice Heald noting (at page 286) that it was not "necessary" for the due exercise of its jurisdiction that the Board be able to award costs in a proceeding before it. (Section 10(3) of that Act confers on the Board powers, rights and privileges vested in a superior court of record in respect of certain specified matters as well as "other matters necessary" for the due exercise of its jurisdiction".)

Thus, under the current state of the law there is no impediment to the NEB exercising a general intervenor funding jurisdiction. Rather, the legal impediments emerge only if the foundation for NEB intervenor funding power purports to be the general powers of the Board as a court of record and its incidental powers of a superior court necessary for the due exercise of its jurisdiction.

Thus, there is no bar to intervenor funding through lawful means within the current framework of the NEBA, or to the exercise of any specific jurisdiction to award intervenor funding which may be conferred upon the Board in the future by Parliament.

1.3 Considerations of Tort Law

Before proceeding to consider particular options for intervenor funding in Board proceedings, a very brief look at the impact of the tort of maintenance is in order. Maintenance is an actionable tort involving the promotion or support of litigation by persons who do not have an interest in the proceedings. Normally such support involves defraying the expenses of litigation. In addition, if an agreement to split the proceeds between the litigant and the maintainer exists, the related tort of champerty occurs.[1] In *Goodman* v *R.*, a criminal case involving maintenance (maintenance and champerty are no longer crimes in Canada but remain actionable torts in common law jurisdictions) Justice Kerwin found that for maintenance to occur; "...there must exist that officious interference, that introduction of parties to enforce their rights which others are not disposed to enforce, that stirring up of strife, to constitute the crime of maintenance".

Intervenor funding will not be affected by the tort of maintenance because:

1. a basis can exist in federal legislation for an intervenor funding program that is legitimately within a federal head of jurisdiction under the *Constitution Act 1867*;

2. proceedings before the NEB are not litigation as there is no *lis inter partes*; (a dispute actionable at law between parties)

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[1] The requisites of Champerty were explained by Associate Justice Whittaker in Monteith v Calladine; "There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife or other improper motives".

3. the motive for providing intervenor funding is not officious intermeddling or the stirring up of strife but to ensure that an adequate record representing all affected interests is available to the regulator for decision-making purposes; and

4. funds will be made available to those who cannot afford the cost of making satisfactory public interest representations to the NEB and the lack of adequate private funding will be an important component of any NEB intervenor funding program.

Chapter 2

Options

The Board has considered a wide variety of options for intervenor funding before settling on the recommended approach for the implementation of an NEB intervenor funding program. It is desirable at this point to canvass the options examined by the Board for intervenor funding in NEB proceedings. All of these options are consistent with the judgments of the Courts concerning the distinctions between awards of costs and intervenor funding. It should be noted that the following options were not matters considered by the Court in the *Costs Reference*, either because they rely on provisions not cited to the Court in that case, or because the provisions were enacted after the date of the *Costs Reference*.

2.1 A Budget Based Option

The budget based option draws on administrative provisions involving the FAA and the NEBA and may be implemented by the NEB under its current mandate if spending authorization is granted by Parliament. Readers of this Report who are unfamiliar with the expenditure management controls of the Government of Canada may wish to read Appendix II of this Report which provides detailed background information.

2.1.1 Expenditure Management and Cost Recovery Model

2.1.1.1 Appropriations Act Authority

It is a fundamental principle of Parliamentary government based on the British model that all expenditures made by government departments or agencies must be approved by Parliament before the expenditure is made. In fact it is illegal for a government department or agency to expend funds without the authorization of Parliament. Parliamentary approval begins with the tabling in the House of Commons of the Estimates, a series of documents which contains the government's expenditure budget for the following fiscal year.

The Main Estimate contains a summary of the funds requested by each department or agency. The requested funds may distinguish between expenditures that are voted on from year to year and those expenditures which are authorized once and continue from year to year. The latter expenditures are usually authorized under enabling legislation (ie. not under an appropriations act) and are usually referred to as statutory appropriations. Appropriations which are not statutory in nature must be voted upon annually.

Each spending authority set out in the Main Estimates is called a "vote". Often there is only one vote per program but there can be more than one vote where a department or agency is engaged in making grants or contributions. Public funds cannot be shifted between separate votes without the concurrence of Parliament.

Ultimately when the estimates are voted upon in Parliament and enacted into law they become the *Appropriations Act* for that particular fiscal year.[2]

2.1.1.2 NEB Program Spending Authority

Expenditure management is regulated through *ex-post facto* audits which involve a comparison of expenditures to the purpose and object of the enabling statute (eg. the NEBA) under which the expenditures have been made. Thus, any expenditure of funds made by the NEB for the purposes of intervenor funding will be audited to ensure its consistency with the National Energy Board Program defined by the NEBA, and to ensure that the expenditure has been made in accordance with the provisions of the FAA.

As a first step it is necessary to consider whether the funding of intervenors may be made pursuant to the NEBA. If such expenditures are within the scope of the Act and hence the National Energy Board Program, funding options and financial arrangements can be made available for this purpose and funds may be committed for such expenditures pursuant to the FAA. Accordingly, it is necessary to examine the statutory bases for intervenor funding within the NEBA.

The NEB is an independent regulatory tribunal which has, as its primary responsibility, the protection of the Canadian public interest by regulating specific activities of the oil, natural gas and electricity industries. The Board also advises the government on matters relating to the development, use and regulation of energy resources. The mandate of the Board is very broad and imports a very wide discretion. However, there is no provision in the Act which now authorizes the Board to fund intervenors. There are however, powers conferring the authority to make subordinate legislation which can be used by the Board or by government to initiate an intervenor funding program at the NEB.

The creation of an expenditure management model for intervenor funding in proceedings conducted under the NEBA must begin with an appropriation of funds in an appropriations act.

The next step will be to ensure that authority exists within the NEBA or subordinate legislation made pursuant to the NEBA for the administration of an intervenor funding program. Although there is no specific existing authority in the NEBA that addresses intervenor funding, there is an avenue of subordinate legislation within the Act which can permit the creation of the necessary administrative framework.

2.1.1.3 NEBA Rules

A very broad power to make rules is conferred upon the Board by section 8 of the NEBA. That provision states:

> 8. The Board may make rules respecting
>
> (a) omitted

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[2] Public Administration in Canada, 2nd ed. Kenneth Kernaghan and David Siegel, Nelson Canada, Scarborough, 1991, pp. 589, 613.

(b) the procedure for making applications, representations and complaints to the Board and the conduct of hearings before the Board, and generally the manner of conducting any business before the Board;

(c) omitted

(d) generally the carrying on of the work of the Board, the management of its internal affairs and the duties of its officers and employees.

This power represents a broad authority to make rules concerning the adminstration of the Board. The effect of general words of this kind were discussed by the eminent authority on legislation, E.A. Driedger in his text "The Composition of Legislation"[3], where, in discussing subordinate legislation, he stated:

> Most Acts conferring power to make regulations contain a general power to make regulations *for giving effect to this Act* or for *carrying the purposes and provisions of this Act into effect*. These general words sometimes stand alone and sometimes follow, or precede, an enumeration of specific powers.
>
> Such power can, without any harm being done and without causing dispute, be given a fairly liberal interpretation if only administrative regulations are made. But a general power should be narrowly construed (either when drafting the statute or the regulation) if penal regulations are intended.

This principle is equally applicable to rules as well as regulations and to the specific wording in section 8 of the NEBA since it reflects a broad principle of statutory interpretation. Furthermore, the rules which would be promulgated by the Board would be administrative rules which would regulate the expenditures initiated pursuant to the appropriation of funds in an appropriation act. There would be no penal consequences associated with the rules.

The Board has never resorted to its rule-making power pursuant to section 8 of the NEBA so there are no precedents to indicate the circumstances under which the Board has considered the rule-making power to be a desirable instrument for executing the policy of Parliament embodied in the Act. Nevertheless, it would seem that rules relating to intervenor funding would be within the jurisdiction of the Board under this section provided that they are directed at the administration of funds voted by Parliament for carrying out the National Energy Board Program.

Furthermore, the use of the rule-making power in section 8(d) provides certain advantages, in that it constitutes a form of subordinate legislation that is not captured by the *Statutory Instruments Act* and thus would be exempt from the lengthy process of examination and scrutiny applied to regulations. An exemption for this type of rule from the regulations process is supplied by paragraph (b) (ii) of the definition of "statutory instrument" contained in section 2(1) of the *Statutory Instruments Act*. An exemption appears to be available by virtue of the fact that the only rules of a quasi-judicial body which are caught by the definition of a statutory instrument are those rules which govern the practice

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[3] The Composition of Legislation, second edition, revised, Department of Justice, Ottawa, 1976, p. 121.

and procedure in proceedings before that body. Although intervenor funding does relate to proceedings before the Board, the focus of any rules promulgated pursuant to section 8(d) of the Act would be on administration of the expenditure of public funds, and hence are administrative in nature.

This remedy also provides flexibility because it can be exercised by either Board Members or officials of the Board. A consideration for the Board is to maintain the integrity of its processes by ensuring that no claim of bias can be made against it with respect to any part of its decision-making. The flexibility provided by this method can accommodate vesting the expenditure authority in an administrative officer of the Board whose duties do not involve regulatory matters. As a means of assisting any official charged with this responsibility, it may be desirable for the Governor in Council to appoint advisors to assist the officials of the Board with respect to the discharge of this function. Section 10 of the NEBA provides that:

> 10. The Governor in Council may appoint and fix the remuneration of experts or persons having technical or special knowledge to assist the Board in any matter in an advisory capacity.

Individuals who are not employees of the NEB may be appointed under this section to provide advice with respect to particular applications for intervenor funding pursuant to the criteria established for this program. For this purpose a roster of advisors from various specialties could be created and a screening panel could be chosen from the roster for the majority of cases.

Finally, the rule-making power of the Board under section 8(d) can be implemented very quickly and changed quickly, as new circumstances dictate, since it avoids review processes applicable to other forms of subordinate legislation.

A rule-based structure would provide considerable autonomy from the day-to-day affairs of the regulatory process while ensuring that responsible officials remain in control of the expenditures of the NEB. There would however, be a need for the Board to prescribe information requirements. It is thought that any information requirements could be implemented as a rule of practice and procedure pursuant to section 8 (b) of the Act. Such a rule would not be within the exemption for rules made by a quasi-judicial body as set out in the *Statutory Instruments Act* and therefore an amending regulation to the *National Energy Board Rules of Practice and Procedure 1995* would be required to be enacted by the NEB.

2.1.1.4 Cost Recovery

Having determined that an expenditure management framework can be created for intervenor funding by the National Energy Board, the remaining question concerns the recovery of expenditures by the Board. Unlike most departments and agencies of government, the National Energy Board has been placed on a cost recovery footing by Parliament. This means that the costs of administration of the Board, including its expenditures, may be recovered from undertakings that are subject to the jurisdiction of the Board.

In this context, the provisions of the NEBA concerning cost recovery are essential for analytical purposes. Section 24.1 of the NEBA states that "the National Energy Board may, for the purposes of recovering all or a portion of such costs as the National Energy Board determines to be attributable to

its responsibilities under this or any other Act of Parliament, make regulations" with respect to the recovery of its costs of operations. The text of that provision is as follows:

> 24.1 (1) Subject to the approval of the Treasury Board, the National Energy Board may, for the purposes of recovering all or a portion of such costs as the National Energy Board determines to be attributable to its responsibilities under this or any other Act of Parliament, make regulations
>
> > (a) imposing fees, levies or charges on any person or company authorized under this Act to
> >
> > > (i) construct or operate a pipeline or an international or interprovincial power line,
> > > (ii) charge tolls,
> > > (iii) export or import oil or gas, or
> > > (iv) export electricity; and
> >
> > (b) providing for the manner of calculating the fees, levies and charges in respect of the person or company and their payment to the National Energy Board.
>
> (2) A regulation made under subsection (1) may specify the rate of interest or the manner of calculating the rate of interest payable by a person or company on any fee, levy or charge not paid by the person or company on or before the date it is due and the time from which interest is payable.
>
> (3) Fees, levies or charges imposed under this section and any interest payable on them constitute a debt to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction.

The Board currently has in place regulations to recover its costs of operations from the regulated industries. In order to implement cost recovery of intervenor funding, it will not be necessary for the Board to enact any amendments to the current *National Energy Board Cost Recovery Regulations*. The Board will be able to ensure that monies expended by it for intervenor funding in respect of specific projects are recovered from the industries which the Board regulates.

The Board considers the option it has presented in this section of the Report to be the best available method of implementing intervenor funding within the current federal legislative framework. However, the Board did examine other plausible options. Two statutory based options were examined but discarded as they were unduly narrow in application or too complex, or costly, to administer. A full discussion of those options is contained in Appendix I.

In addition the Board considered industry sponsored options, as a mechanism to provide intervenor funding. The most prominent method consisted of a toll based approach founded upon voluntary funding by the pipeline industry with subsequent recovery of those expenditures by industry through a Part IV proceeding under the NEBA. However, it was considered that the tolling based option was unlikely to be successful. A full discussion of industry sponsored options follows.

2.2 Industry Administered Options

This part of the report examines options for intervenor funding which may be implemented directly by industry and with a minimum of regulatory involvement.

2.2.1 Voluntary Industry Funding

A self-directed industry-funded intervenor funding program could be provided on a strictly voluntary basis by the energy industry. While this is not, strictly speaking, an option specifically addressed under Federal legislation, it is an option that is congruent with both federal legislation and federal economic policy. However, it is not within the Ministerial terms of reference for the purposes of this Report and therefore will not be addressed further.

2.2.2 The Tolling Methodology Approach

This option can only be implemented in respect of the pipeline industry. Essentially, the pipeline industry would fund an intervenor funding program by providing monies for disbursement to intervenors to ensure their effective participation in decision-making processes before the National Energy Board. However, industry would seek to recover the amount of any disbursements that it made through the tolls charged by the companies and approved by the NEB pursuant to Part IV of the NEBA.

For pipelines regulated on a traditional cost of service basis, provided the Board finds the expenditure reasonable, intervenor funding is recoverable as part of the cost of service and therefore in tolls. Pipeline companies regulated on this basis may be receptive to the idea of a limited and defined program of intervenor funding with a flow-through of costs to the tollpayers.

To assist and support this option, the Board could establish a policy guideline containing a tariff of costs and stipulate that, as a matter of general policy, the Board would consider voluntary payments by a pipeline to intervenors in accordance with the tariff to be a prudently incurred expense, for the purposes of approving the pipeline company's tolls under Part IV of the NEBA. In this way, funding made available by industry for intervenors in proceedings could be approved for the purposes of recovery in the tolls of the companies.

This option is legally viable provided that the Board does not fetter its discretion by binding the exercise of its discretionary powers to any general policy which it articulates. In addition, this option would require the pipeline industry to voluntarily agree to provide intervenor funding as part of the costs of a proceeding, since the NEB lacks the power to compel a pipeline company to provide monies for this purpose.

A variation of this proposal would see the policy guideline made a general order of the Board with provision for a specific approval of the costs of intervenor funding to be made by way of a separate tolls order, at the conclusion of each individual hearing under any part of the NEBA affecting pipelines.

However, a practical difficulty to the implementation of this approach has recently emerged with the current trend by the pipeline industry towards negotiated multi-year settlements of toll cases. For pipelines having negotiated multi-year incentive toll settlements, ie. Interprovincial Pipe Line

Company, TransCanada PipeLines Limited and Trans Mountain Pipe Line Company, it appears that charges related to intervenor funding, to the extent that they are of an operational nature, would be included in the incentive cost envelope in the case of TransCanada PipeLines Limited and would be included in the inflation adjusted starting point in the cases of Interprovincial Pipe Line Limited and Trans Mountain Pipe Line Company. Under these circumstances, there is no longer a direct link between costs and tolls. One would expect that pipelines have the incentive to keep regulatory costs, including intervenor funding, as low as possible and to keep attempting to reduce those costs.

Another recent innovation in the pipeline industry that would have implications for a tolling methodology approach is the creation of greenfields pipelines, for example Express Pipeline Limited. Here it would appear that long-term, market-based tolling is required to get any large scale project off the ground. In such cases, a project is initially subject to substantial regulatory risk and therefore if a project is denied by a regulator, proponents of that project would have to absorb the front-end costs, including intervenor funding. Should a project go ahead, to the extent that service prices or tolls are not directly based on costs, recovery of intervenor funding is a function of what the market will bear. Again, one would expect that proponents of greenfields projects would want to limit as much as possible their exposure to the financial risks of intervenor funding.

Chapter 3

Recommendations and Implementation

The Board has given much thought to the creation of a viable mechanism to accommodate intervenor funding within its mandate. Considerations of transparency, the avoidance of any compromise to the perceived integrity of the NEB's mandate and procedures and administrative efficiency are paramount considerations.

3.1 A Budget Based Approach to Intervenor Funding

For the purpose of providing intervenor funding in proceedings before the NEB, the Board recommends that an expenditure management and cost recovery model be implemented. The Board considers that the objectives of transparency, process integrity and administrative efficiency can be met by a program which encompasses:

- spending authority enacted through the departmental estimates by Parliament in an appropriations act;
- administrative rules to be made by the Board pursuant to section 8 of the NEBA;
- delegation of the approval function by the Board to an officer who would not be associated with the specific regulatory process for which intervenor funding is sought;
- appointment of outside advisors by the Governor in Council pursuant to s. 10 of the NEBA to screen intervenor funding applications;
- enactment of appropriate amendments to the *National Energy Board Rules of Practice and Procedure, 1995* to set out the information requirements and forms for making applications to the Board for intervenor funding;
- actual disbursement of funds in accordance with a contribution agreement under the FAA or an agreement for which legal authority exists pursuant to the NEBA;
- subsequent recovery of all intervenor funding expenditures made by the NEB from companies subject to the continuing jurisdiction of the NEB pursuant to the *National Energy Board Cost Recovery Regulations*;
- post-hearing auditing of expenditures made by intervenors pursuant to contribution agreements or agreements made under statutory authority to ensure that monies provided to intervenors have been expended prudently and for the purpose for which they were provided.

Figure 3-1 is a flow chart which describes the architecture for creating an expenditure management and cost recovery model for intervenor funding by the NEB. At the present time, the future application process in respect of intervenor funding is expected to follow the paths outlined in Figure 3-2 below.

Should government policy determine that it would be desirable to implement intervenor funding, Parliament must consider and enact expenditure authority in an appropriations act. Following such an enactment the NEB could proceed to launch an intervenor funding program by creation of the necessary administrative and policy instruments, including appropriate liaison with the public.

3.2 Future Action

A substantial degree of public consultation will be required before the implementation phase of NEB intervenor funding can be completed.

Figure 3-1
Architecture of the Proposed NEB Intervenor Funding Process
March, 1996

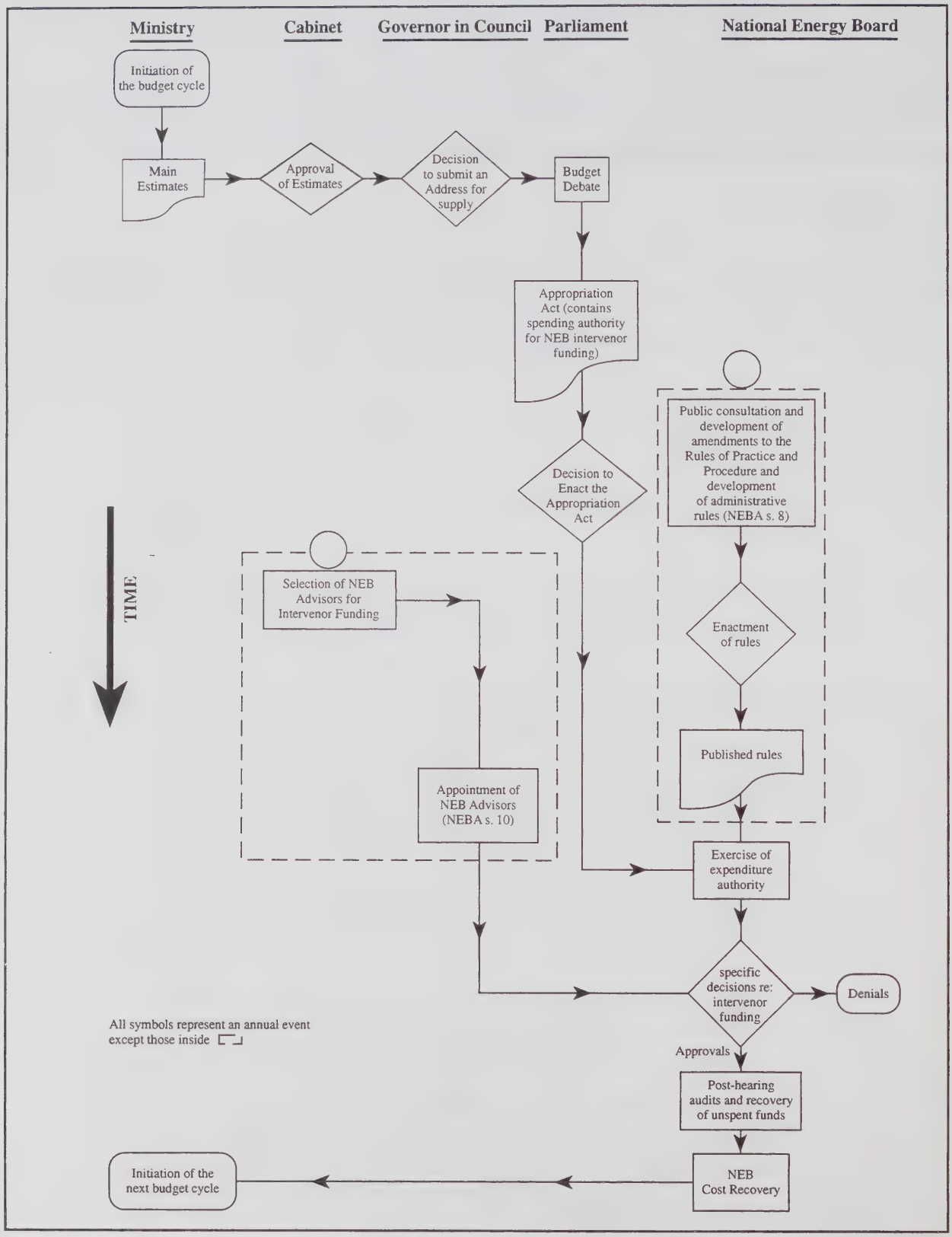
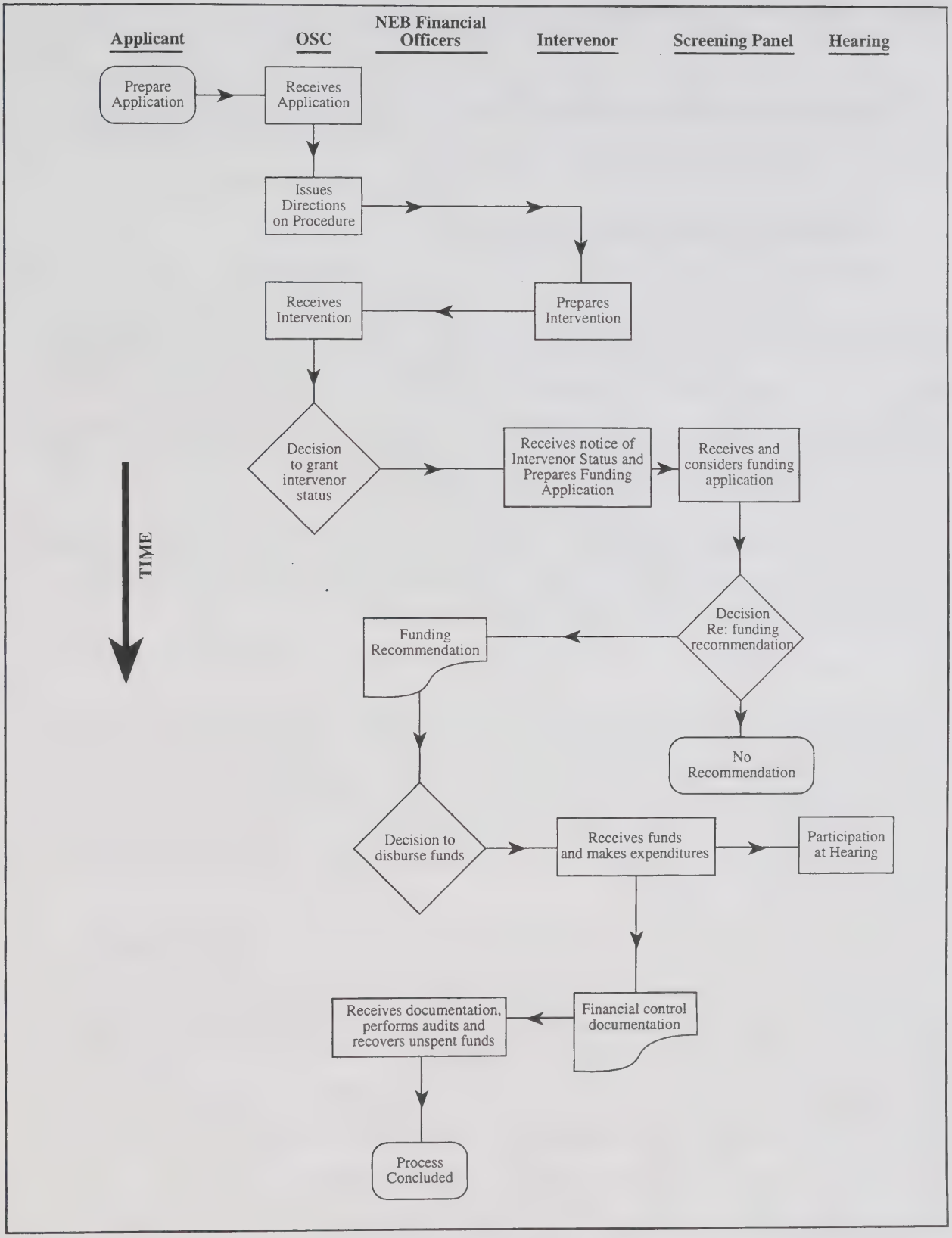


Figure 3-2
Proposed NEB Intervenor Funding Application Process
March, 1996



Appendix I

Other Federal Options

This appendix to the report addresses the potential for using statutory options or programs under non-energy related legislation to implement intervenor funding. Although these options were examined by the Board it was discovered that they were too narrow, or administratively cumbersome, and therefore they were discarded from consideration as a primary option.

1 Participant Funding Under the CEAA

1.1 Introduction

One of the fundamental purposes of the CEA Act is to ensure the opportunity for public participation in environmental assessments. The main instrument for achieving this objective has been intervenor funding through the Participant Funding Program ("PFP"), which is administered by the CEAA Funding for the PFP, which is currently allocated from the Green Plan, will lapse as of 31 March 1997. The Agency is presently undertaking a review of participant funding alternatives. This review is part of a larger exercise to examine cost recovery options for CEAA.

The following section describes how the PFP currently operates and the criteria that apply in deciding who receives funding. This is followed by a section which discusses the ongoing cost recovery exercise, likely recommendations and the timing of the exercise. The final section briefly addresses the question of what other intervenor funding options are possible.

1.2 Existing PFP System

The PFP system was initially financed for the 1991-97 period under a Green Plan allocation of $8.5 million. Recent budget cuts to the Green Plan resulted in the overall PFP allocation being cut to $6 million. Within the global budget, the amounts of intervenor funding devoted to panel reviews are decided on a case-by-case basis. The largest PFP allocation for a single project was approximately $1.5 million (the Great Whale project). The normal range of funding available for an individual project is $75 to $80 thousand. As well as limits on the amount of monies available to intervenor groups, there are controls on eligibility.

In allocating the PFP funding pool for each project, priority is given to applicants whose lifestyle or livelihood is likely to be directly affected by the project. Funds permitting, other groups or individuals are considered (a) where they can demonstrate financial need and accountability, (b) where there is the possibility of cooperation with other groups, and (c) where they can prepare a clearly defined plan of activity consistent with the terms of reference for a mediation or review panel. The scope of the funding is restricted to covering the costs of preparing for and participating in the public review process as defined by the scope of a review panel's terms of reference. Funds may not be used to cover lost income, overheads or non-project related activities. While fees for legal advice are covered, the payment of fees for legal representation at public hearings is discouraged.

Agency staff administer the PFP independently, that is, neither the Responsible Authority nor the Panel Review Committee are involved in the PFP. A PFP Manager sets the amount of funding (for both scoping and hearing aspects of a project) based on scoping information provided by the designated Agency Panel Manager. Once the Agency has approved the funding level, a press release is issued detailing how to apply for intervenor funding. Subsequently, a funding administration committee with one Agency representative and two non-government members is struck to independently review applications and recommend specific grants. The PFP process generally adds two months at the front end of a panel review.

1.3 Intervenor Funding Review Process

In the autumn of 1995, an Interdepartmental Working Committee (TC, NRCan, DFO, DOE, DIAND, Health Canada and the Agency) began a review of ways and means for the CEAA to recover costs, including costs associated with public participation. It is expected that a discussion paper on options will be circulated to stakeholders (industry associations, environmental NGOs, responsible authorities, aboriginal organizations and other interested parties). The stakeholder would be allowed 60 to 90 days to comment. A Cabinet Submission on cost recovery may eventually follow.

The Agency appears to favour the continuation of a somewhat modified PFP with cost recovery from the proponent. Industry may be supportive of this proposal because it would have similar features to those of the Alberta Energy and Utilities Board ("AEUB") public participation system. The AEUB cost recovery only applies to expenses of those directly affected by a proposed project and is restricted to application-specific matters. The proposed narrowing of current PFP criteria would mean that the costs to proponents would likely be significantly less than at present. Given the Agency's proposal, funding for intervenors to pursue general issues or policy concerns would not be available.

1.4 Future Responsibility For Participant Funding

Section 4 of the CEA Act states that "the Minister shall establish a participant funding program to facilitate the participation of the public in mediations and assessments by review panels". The Agency interprets this as requiring its staff to take full control of the intervenor funding program. In reviewing options for intervenor funding the Agency has not considered either the possibility of responsible authorities administering intervenor funding on the Agency's behalf or substituting other forms of public consultation. These and other options may have to be addressed should stakeholders fail to reach a consensus on the proposed approach.

1.5 Financial Administration Act Fees and Charges Regulations

Another possibility for funding intervenors which was examined consisted of exacting charges for the grant of any regulatory activities under the NEBA. The FAA provides a mechanism for charging fees in connection with the grant of a discretionary authority by the government. Section 19.1 of the FAA states:

> 19.1 The Governor in Council may, on the recommendation of the Treasury Board,
>
> > (a) by regulation prescribe the fees or charges to be paid for a right or privilege conferred by or on behalf of Her Majesty in right of Canada,

by means of a licence, permit or other authorization, by the persons or classes of persons on whom the right or privilege is conferred; or

(b) authorize the appropriate Minister to prescribe by order those fees or charges, subject to such terms and conditions as may be specified by the Governor in Council.

Section 19.1 can be interpreted to include major authorizations under the NEB Act, such as a certificate of public convenience and necessity for the construction and operation of a pipeline, as the issuance of the certificate is authorized by the Governor-General in Council, (ie. the Crown acting in right of Canada).

In addition, this provision appears broad enough to encompass the issuance of an authorization by the NEB itself, (such as a section 58 order), as the phrase 'Her Majesty in right of Canada' is often synonymous with the Federal Government.[4]

Consideration is also required of the potential effects of section 19.3 which states:

19.3 Regulations and orders under section 19 and 19.1 are subject to the provisions of any Act of Parliament relating to the service or the use of the facility, or to the right or privilege, but, for greater certainty, may be made even though an Act of Parliament requires the provision of the service or facility or the conferral of the right or privilege.

It would seem however, that this is merely a saving provision to ensure that contracts with government or the existence of a statutory obligation to provide a government service are not a bar to charging a fee for that service. Thus, it would not appear that this provision will have any effect on the ability to prescribe fees and charges for authorizations pursuant to section 19.1.

In order for this option to provide an effective means of intervenor funding, it would probably be necessary for the Board to obtain authority for the creation of a revolving fund to which fees and charges would be deposited and from which intervenor funding could be disbursed. Subsections 29.1 (2) - (4) of the FAA are concerned with revolving funds and stipulate as follows:

29.1 (1) (omitted)

(2) A department may, in respect of its approved programs or authorized expenditures, be authorized by an appropriation Act

(a) for the purposes that are specified in that Act, to expend revenues that it receives in a fiscal year through the conduct of its operations to offset expenditures that it incurs in that fiscal year; and

(b) for such purposes and with such drawdown limit as are specified in that Act, to establish a revolving fund.

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[4] Paul Lordon, Q.C. "Crown Law", Butterworths, Toronto and Vancouver, 1991, p.31.

(3) The purposes and drawdown limit of a revolving fund referred to in subsection (2) may be amended by means of an appropriation Act

(4) The operation of a revolving fund and the spending of revenues pursuant to this or any other Act of Parliament is, in addition to any limitation imposed by statute, subject to such terms and conditions as the Treasury Board may direct.

Although the mechanism provided by section 19.1 of the FAA is a viable legal option, there are some significant disadvantages to overcome. In the first place, the fees and charges could only be charged where an authorization was granted. If the application for a certificate of public convenience and necessity, or a section 58 order, was denied there would be no fee or charge payable by the proponent.

That disadvantage might be mitigated by the creation of a revolving fund, provided that intervenor funding disbursements did not exceed the total sum of fees and charges accounted for within the revolving fund. However, due to the administrative costs of managing a revolving fund it would, in the opinion of the Board, require annual intervenor funding expenditures in excess of $5,000,000.00 to warrant the establishment of a revolving fund mechanism. In addition, this option requires regulatory instruments which must be submitted for statutory examination before they can become effective and therefore it is a relatively inflexible option.

Appendix II

The Financial Framework

1 Introduction

This appendix discusses the financial framework for expenditure control, which is the setting for the budget based solution proposed in this Report.

2 The Financial Administration Act

Part I of the FAA deals with organizational matters and establishes the Treasury Board as a statutory committee of the Queen's Privy Council for Canada. Section 7 (1)(c) states that the Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever.

Part III of the FAA is concerned with disbursements of public monies. Section 26 is very important, as it stipulates that, subject to the *Constitution Acts 1867 - 1982* no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament. This is the bedrock upon which all government expenditure is founded. No public funds may be disbursed without the authority of Parliament. Consistent with modern public finance practice, appropriations of public monies by Parliament normally entail a general appropriation. As an example, an appropriation of funds for the purposes of the NEB might say: 'for the funding of program expenditures by the National Energy Board' or other general words to the same effect. A general appropriation of funds reduces the risk that commitments and expenditures may subsequently be made contrary to the terms of an appropriations statute.

Flowing outwards from the essential need for a parliamentary appropriation of funds are the expenditure control provisions of the FAA. Section 32 (1) states that no contract or other arrangement providing for a payment shall be entered into with respect to any program for which there is an appropriation by Parliament (or an item included in estimates then before the House of Commons to which the payment will be charged) unless there is a sufficient unencumbered balance available out of the appropriation (or item) to discharge any debt that, under the contract or other arrangement, will be incurred during the fiscal year in which the contract or other arrangement is entered into.

Section 34 is critical to the expenditure management option as it deals with the entitlement of the recipient to receive the funds and the obligations of the government to pay. Under that provision, no payment shall be made by any part of the Public Service of Canada unless the deputy of the appropriate Minister, or another person authorized by that Minister (in this case officials of the NEB) certifies that the recipient is entitled to the money. The text of the applicable portion of section 34 is as follows:

> 34 (1) No payment shall be made in respect of any part of the public service of Canada unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister, or another person authorized by that Minister, certifies
>
> (a) omitted
>
> (b) in the case of any other payment, that the payee is eligible for or entitled to the payment.

Section 34(2) states that the Treasury Board may prescribe policies and procedures to be followed to give effect to the certification and verification required under subsection (1). However, the Board has not discovered any such policies which would materially impact upon an option to fund intervenors through expenditure management and cost recovery.

Before deciding on the financial sourcing options and the financial arrangements, it is necessary to first determine the appropriate program delivery alternative, as that will have a substantial impact on the decision. The choice of financial arrangement and funding option must be able to withstand the test of public scrutiny and achieve the best value for the dollars spent. Some guiding principles include: parliamentary control, authority, risk management, accountability, fiscal environment, cost benefit analysis and disclosure. A more detailed discussion of these criteria is as follows:

Parliamentary Control - This criteria influences the entire range of the government management framework. Appropriation acts specify the amounts and define the purposes for which funds may be used.

Authority - Legislation vests authority in departments and agencies to carry out their programs and activities. Appropriations acts provide a legislative means whereby departments and agencies may obtain financial authority while general statutes such as the FAA provide a legislative means by which agencies and departments can initiate expenditures of amounts appropriated by Parliament. In addition, contracting authorities and financial policies emanating from the Treasury Board provide non-legislative mechanisms by which departments and agencies receive and execute financial authority.

Enabling legislation, such as the NEBA, provide program authority to agencies and departments and it is pursuant to those programs that the expenditure of appropriated funds occurs.

Risk Management - This criteria involves determining the probability, impact and materiality of an event occurrence. The objective of risk management is to limit or minimize the damage to and liability accruing to the Crown. Risk management analysis processes include the identification of potential perils, factors and types of risks, including financial risks to which departmental assets, program activities and interests are exposed. Departments must analyze and assess the risks identified, select safe options and design and implement cost-effective prevention and control measures.

Accountability - The accountability of the agency or department to Parliament, program clients and ultimately the Canadian taxpayer is an essential ingredient of the government's financial management framework. It means accounting to Parliament for the efficient use of appropriated resources to meet program objectives. The aim is to ensure parliamentarians and the public see that the taxpayers'

dollars have been spent with due regard for probity and prudence and that the intended objectives have been achieved.

Fiscal Environment - The scarcity of resources in recent years has forced departments and agencies to re-evaluate their alternatives for program delivery and funding options to ensure that both are cost effective. For example, it would not be cost effective to establish a revolving fund if the cost for the necessary administration, costing and accounting systems exceed the revenues raised through user fees.

Cost-Benefit Analysis - This criteria requires that sound cost and qualitative information critical for decision-making in the current fiscal environment is available to decision-makers.

Disclosure - Financial disclosure is an essential principle that is achieved through the annual tabling in Parliament of Part III of the Estimates and the Public Accounts. Disclosure ensures that the objectives set by Parliament and the government are being realized. Ministers use Part III of the Estimates to report to Parliament on the proposed expenditure plans of the departments or agencies under their political direction for the upcoming fiscal year. The Estimates also show how resources will be used during the current fiscal year in carrying out the department's mandate and how resources were used during the previous fiscal year were used. The Public Accounts of Canada displays actual expenditures incurred under each appropriation, including specific information about contribution and grant arrangements.

A number of options exist to make funds available to the NEB for the purpose of disbursements to intervenors. These options are canvassed below.

3 Funding Options

Funding options are the alternative sources of funds used to finance different delivery options. As shown below, funds can be obtained through traditional appropriations, special revenue authorities (eg. revolving funds or net voting) or specified purpose accounts established for specific conditions. Parliament grants spending authority by enacting appropriation acts.

3.1 Traditional Appropriations

Traditional appropriations may be used when the service is being delivered by the government itself, through financial arrangements to third parties or in partnership agreements (eg. transfer payments). Traditional appropriations are used for activities that have large fixed costs or fixed and variable costs with predictable demand. They reflect the principle that Parliament provides funding for specific purposes and therefore these funds cannot be used for any other purpose nor can they be transferred between appropriation votes without parliamentary approval. For the purposes of intervenor funding, a parliamentary appropriation is the preferred method where public funding in an amount not exceeding $1,000,000.00 is to be provided.

3.2 Revolving Funds

A revolving fund is a continuous authorization by Parliament to make payments out of the Consolidated Revenue Fund to sustain operations. Users typically fund this type of operation and it is considered self-sufficient for the most part. Parliament must give authority to establish and operate a revolving fund through an enabling statute or an appropriation act. For the purposes of intervenor

funding, a revolving fund may be an appropriate funding mechanism where the amount devoted to intervenor funding exceeds $5,000,000.00. The increased threshold above that of a traditional appropriation results from the higher administrative costs associated with revolving funds.

3.3 Net Voting

Net voting is an alternative means of funding selected programs or activities whereby Parliament authorizes a department to apply revenues towards costs directly incurred for specific activities and votes the net financial requirements for a fiscal year at a time (ie. estimated total expenditures minus estimated revenues). Under net voting, users finance only part of the cost of a program while other sources of government revenue finance the remainder. Consequently, a net voting operation is normally only partly self-sufficient. An appropriation act, an enabling act or a departmental organization act may provide net voting authority. The authority for net voting must be approved each year through the vote wording in an appropriation act. Net voting would be an appropriate funding mechanism where intervenor funding was cost shared between the NEB and industry, and where the amounts required by the NEB as its share would exceed $1,000,000.00.

3.4 Specified Purpose Accounts

Departments and agencies receive, for various reasons, money that must be separately accounted for in the Accounts of Canada. In some cases, the enabling legislation requires that revenues be earmarked, and that related payments and expenditures be charged against such revenues. In other cases, departments and agencies receive money for a specific purpose that is recorded as a liability of the Government of Canada because it constitutes a financial obligation of the government. Given the special nature of these funds, accounts are opened in the general ledger to ensure that they are used only for the purpose for which they were received, ie. the specified purpose accounts. The following are the common reasons for establishing a specified purpose account:

- trust accounts established for funds administered by the Government of Canada,
- receipt of funds by the Government of Canada from external entities involved in cost sharing, joint project and partnership arrangements in advance of cost incursion,
- receipt of funds by the Government of Canada as conditional contributions, gifts, bequests and donations. Where the object of expenditure is clear and specific, the government must only use or spend those funds for the stated purpose,
- receipt of funds by the Government of Canada when it administers a program or a portion of a program on behalf of a provincial government,
- receipt of funds by the Government of Canada as an award made to the Crown by a court where the court has stipulated that the moneys must be used for specific purposes.

One possibility that exists is for industry to donate funds to the Board for use in funding interventions. A donations mechanism would provide industry with enhanced control over the criteria for the expenditure of such funds and avoid the use of the NEB cost recovery mechanism as a means of securing funding on an annual basis. The Board has some experience with this type of funding through the ESRF. If this mechanism was employed, a special purpose account would be the appropriate means of funding the NEB intervenor funding program. SPAs are established through the Department of Government Services and are credited to the Consolidated Revenue Fund and disbursements are made against the holdings of the account within that fund. Audit mechanisms can be negotiated between industry and the government for accountability purposes.

4 Financial Arrangements

Financial arrangements flow from funding options. A financial arrangement is any arrangement between the Government of Canada and outside parties which results in an actual or potential outlay of resources. A financial arrangement may include eligibility criteria, an agreement stipulating the obligations of each party and terms and conditions outlining the minimum requirements to be incorporated into an agreement.

Financial arrangements with third parties may be divided into two categories. The first category includes transfer payments and the second category includes all other arrangements. A brief discussion of these alternatives follows:

4.1 Transfer Payment Arrangements

Transfer arrangements consist of transfers of money from the Government of Canada to individuals, organizations or other levels of government in order to further government policy or programs. The Government of Canada does not as a result of the transfer receive directly any goods or services as it would if a purchase or sale transaction had been entered into. Nor does the government expect to be repaid in the future, as it would if the transaction had been structured as a loan. Finally, under a transfer, the government does not expect a financial return on investment.

The types of government transfers that are entered into include contributions, flexible transfer payments, alternative funding arrangements, grants and other transfer payments. A brief discussion of these alternatives ensues:

4.1.1 Contributions and Repayable Contributions

A contribution is a conditional transfer made when there is or may be a need to ensure that payments have been used in accordance with legislative or program requirements. More specifically, contributions are based on reimbursing a recipient for specific expenditures according to the terms and conditions set out in the contribution agreement and signed by the respective parties. Repayable contributions are contributions of which all or part are repayable if terms and conditions requiring repayment are met or if a fixed schedule of repayments without interest is attached.

4.1.2 Flexible Transfer Payments and Alternative Funding Arrangements

Flexible Transfer Payments ("FTP") and Alternative Funding Arrangements ("AFA") are based on formula or fixed costs. AFAs allow for program redesign to meet a recipient's needs, ie. once payment is made the recipient may redistribute the funds among several categories of expenditure in the arrangement. FTPs, on the other hand, do not allow for program modification. AFAs and FTPs are like contributions in that there is a written agreement setting out the obligations of both parties including provision for audit. This mechanism would be appropriate in the context of intervenor funding where there was cost sharing of the program between the NEB and intervenors.

4.1.3 Grants

A grant or a class of grants is an unconditional transfer payment where the government chooses to further policy or program delivery by issuing payments to individuals or organizations. Eligibility criteria and applications received in advance of payment provide sufficient assurance that the objectives of payment will be met, therefore specific conditional agreements with the recipient are not required. The government must list a grant or a class of grants in the Estimates but may withhold the grants if eligibility criteria are not met. The grant mechanism suffers from a lack of adequate financial controls which would impede its effectiveness as a means of providing intervenor funding.

4.1.4 Other Transfer Payment

An Other Transfer Payment ("OTP") is a transfer based on legislation or an arrangement that normally includes a formula or schedule as one element used to determine the expenditure amount. However, once a payment is made, the recipient may redistribute the funds among several categories of expenditure in the arrangement. As with grants, this mechanism may not provide adequate financial controls, thus diminishing its effectiveness as a tool for providing intervenor funding.

4.1.5 Disbursements

Another method to provided intervenor funding may be to utilize the ordinary commitment and disbursement mechanism provided through sections 33 and 34 of the FAA. This would involve a request for funding from a potential intervenor within approved criteria. Funds committed for the specific purpose may be disbursed pursuant to section 34 (b) of the FAA. This method would be the preferred option where relatively modest disbursements were required to be made under the intervenor funding program.

4.2 Other Arrangements

Departments and agencies may decide to support or become involved in large private sector undertakings. While these private sector initiatives fall within departmental objectives, departments may not be directly involved in the procurement of goods and services or in the operation of the facility or organization that is being supported. The different types of arrangements include cost-sharing arrangements, joint projects, joint ventures and mega-projects.

5 Choice of Financial Arrangement

In determining the choice of financial arrangements a number of considerations are appropriate. Government transfer payment arrangements will be appropriate where one or more of the following conditions are satisfied:

- the departmental mandate allows for the proposed program or activity and the appropriate authorities are in place to support program objectives (ie. grant or contribution authorities)
- the government determines that it would benefit the public in general and government objectives would be furthered by providing financial assistance. Normally the government provides less than 100% to support the activities or projects which benefit third parties
- the government decides that an outside party is better equipped than the government to assist in the delivery of a specific service or to handle a specific task
- the government would not receive goods or services as a result of proposed expenditures
- specific Acts of Parliament, program legislation, or other government sponsored policies and regulations require the delivery of programs
- any transfers pursuant to business assistance programs promote economic development rather than subsidies to the private sector
- a transfer would be the most effective and efficient means of supporting specific program objectives
- systems and procedures are in place to properly account for the use of resources (ie. performance evaluation links dollars spent to program results and evaluation criteria support the program approval) and disclose meaningful information to Parliament
- reasonable assurance can be given that the proposed transfer would not result in duplicate financing or "stacking" (ie. financing of similar activities by more than one federal government department, other levels of government or other sources external to the government).

As regards the other arrangements category, applicable criteria for choosing that option are largely task-oriented programs often involving substantial private sector involvement in decision-making. Usually they entail a significant public policy decision by government to participate. Given their scope, they do not appear to be relevant to an NEB intervenor funding program.

6 Ex Gratia Payments

An *ex gratia* payment is a special type of financial arrangement which has been defined[5] as "a gratuitous payment, for which no liability is recognized, that is made by the government as an act of benevolence in the public interest." The Board examined *ex gratia* payments carefully to determine whether they might provide a suitable basis for disbursing funds to intervenors as part of an NEB intervenor funding program.

Ex gratia payments are an aspect of the royal prerogative power and therefore no statutory power for them is required. However, there must be an appropriation of funds in an appropriations act in order for the Crown to make payments *ex gratia*. According to the author Lordon[6]:

> The key to *ex gratia* payments is that there is no legal obligation on the Crown to pay. The Crown only makes such payments when it feels morally obliged to do so or wishes to do so for policy reasons. Thus, an *ex gratia* payment is totally discretionary, and a claimant does not have any legal right thereto.

He also states:[7]

> The Crown's discretion with respect to *ex gratia* payments is absolute and affords the Crown a great deal of flexibility in handling a wide variety of claims. Through this mechanism, the Crown may grant a reward, compensate those falling in the interstices of provisions for claims against the Crown, and provide relief where such payment is warranted but not otherwise provided for.

An *ex gratia* payment may be made where the matter is not covered by an agreement and is not contrary to general law. Conditions may be attached to the *ex gratia* payment by the Crown and the recipient is under no obligation to accept the payment.

Currently, *ex gratia* payments are governed by the *Ex gratia Payments Order, 1991*, P.C. 1991-8/1695, September 5, 1991, which provides that the Treasury Board may authorize *ex gratia* payments. The Treasury Board may designate a deputy head of a department to make such payments and may authorize any deputy head to delegate approval authority for *ex gratia* payments to an employee of the deputy head's department.

The Treasury Board's Policy on Claims and Ex Gratia Payments issued in 1994 guides public servants in the exercise of the Crown's prerogative to make *ex gratia* payments. It defines an *ex gratia* payment as follows:

> ***Ex gratia payment*** (*paiement à titre gracieux*) - means a payment made to anyone in the public interest for loss or expenditure incurred for which there is no legal liability on the part of the Crown.

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[5] Paul Lordon, Q.C. "Crown Law", Butterworths, Toronto and Vancouver, 1991 at p.431.

[6] Paul Lordon, Q.C. "Crown Law", Butterworths, Toronto and Vancouver, 1991, p.434.

[7] Paul Lordon, Q.C. "Crown Law", Butterworths, Toronto and Vancouver, 1991 at p.436.

Clause 13 of the policy stipulates:

> 13. In deciding whether to make an ex gratia payment, deputy heads shall consider whether there are any other reasonable means of compensation, and that:
>
> (a) claims and ex gratia payments are subject to consideration of federal or provincial statutes, private or public programs, contract provisions, commercial insurance or recovery from third parties;
>
> (b) this policy is not to be used to fill perceived gaps or compensate for the apparent limitations in any act, order, regulation, policy, agreement or other governing instruments, e.g. if a particular subject is governed by, but a payment does not appear to meet the terms of, another instrument, this policy cannot be used to expand that instrument - an exception to the governing instrument would need to be sought;
>
> (c) if there does not appear to be a governing instrument, particularly in proposed ex gratia cases, it is imperative that all other possible sources of compensation be reviewed, i.e. statutory or regulatory schemes, other Treasury Board policies, program funding, grants or contributions;
>
> (d) if, after the review, there is still not other source of funds, no liability on the part of the Crown, and no limitation or restriction imposed in existing schemes which would prohibit it, payment may be made ex gratia; and
>
> (e) that amount of the payment should be reduced where the acts or omissions of any person, including persons for whom a payment is being considered, contributed to the loss or expenditure incurred.

Although, it is considered that the law does not preclude resort to payments *ex gratia* for the purposes of NEB intervenor funding, contemporary policy of the Treasury Board and its Secretariat tends to closely link this mechanism to Crown liability issues. Current policies perceive this tool as an exceptional measure and not as a basis for the creation of general disbursement programs. To the extent that no other mechanism for disbursing funds to potential intervenors exists as part of an NEB intervenor funding program, the *ex gratia* mechanism might remain an option for a very occasional disbursement. However, that could raise concerns about the equity of the program. Thus, although law permits *ex gratia* payments for intervenor funding, contemporary policy militates against its use for that purpose.

Appendix III

Table of Statutes, Cases and Authorities

Statutes

Canadian Environmental Assessment Act, 1992, c. 37

Consolidated Hearings Act, 1981 S.O. 1981, c. 20

Constitution Act, 1867, 30 & 31 Victoria, ch. 3 (Imp.)

Environmental Assessment Act, S.O. 1975, c. 69

Financial Administration Act, R.S., 1985, c. F-11

Intervenor Funding Project Act, R.S.O., 1990, c I. 13

National Energy Board Act, R.S., 1985, c. N-7

National Energy Board Rules of Practice and Procedure, 1995 SOR/DORS 95-208

Statutory Instruments Act, R.S., 1985, c. S-22

Cases

Banca Nazionale Del Lavoro of Canada Ltd. v *Lee-Shanok* (1988), 87 N.R. 178 at 189 (FCA)

Bell Canada v *Consumers Association of Canada et al* [1986] 1 S.C.R. 190, 26 D.L.R. (4th) 573 (SCC)

Goodman v *R.*, [1939] S.C.R. 446

Manitoba Society of Seniors Inc. v *Greater Winnipeg Gas Co.* (1982), 18 Man. L.R. (2d) 440 (C.A.)

Monteith v *Calladine* (1964), 47 D.L.R. (2d) 332 at 342 (B.C. C.A.), 49 WWR 641 at p. 652

Re Regional Municipality of Hamilton-Wentworth and Hamilton Wentworth Save the Valley Committee, Inc. (1985), 19 D.L.R. (4th) 356, 51 O.R. (2d) 23

Reference Re National Energy Board Act (1986), 19 Admin L.R. 301, 29 D.L.R. (4th) 35, 69 N.R. 174, [1986] 3 F.C. 275 (C.A.), leave to appeal to the SCC refused (1986), 23 Admin L.R. xxi (note) (SCC)

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